No. 86-421

IN THE

Supreme Court of the United States

October Term, 1986

BOARD OF DIRECTORS OF ROTARY INTERNATIONAL, et al.,

Appellants,

v.

ROTARY CLUB OF DUARTE, et al.,

Appellees.

Appeal from the Court of Appeal of the State of California, Appellate District

BRIEF *AMICI CURIAE* OF THE AMERICAN JEWISH CONGRESS AND THE NATIONAL COUNCIL OF JEWISH WOMEN IN SUPPORT OF APPELLEES

Marc D. Stern
Counsel of Record
Lois C. Waldman
Amy Adelson
American Jewish Congress
15 East 84th Street
New York, New York 10028
(212) 879-4500

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INTEREST OF THE AMICI

The American Jewish Congress is an organization of American Jews founded in 1918. It is dedicated to the preservation of the security and constitutional rights of Jews in America and to ensuring the creative continuity of the Jewish people world-wide. It believes that the welfare of the Jewish people in the United States is inseparably linked to the health of democracy and to the elimination of invidious racial, religious and sexual discrimination from American life.

Among its many activities directed to these ends, the American Jewish Congress (AJC) has filed amicus curiae briefs in this Court in such cases dealing with associational rights and racial and sexual discrimination as Moose

Lodge No. 107 v.Irvis (1971); Runyon v. McCrary (1976) and Hishon v. King & Spalding (1984).

The AJC brings to the issues raised in this appeal the perspective of a national organization, selective in membership, with a particularist agenda dictated by that selectivity, yet one that is firmly committed to opposing racial, religious and sexual discrimination and assuring all citizens equal access to public goods and facilities.

The National Council of Jewish Women was founded in 1893. It has as its purposes, the support of education, community service, and advocacy in the areas of women's issues, children and youth, constitutional rights, aging, Jewish life and Israel.

This brief is submitted with the consent of the parties.

SUMMARY OF THE ARGUMENT

Roberts v. United States Jaycees held that anti-discrimination statutes that require "service" organizations to admit women members do not violate the associational rights of the organization or of its male members if the organization is neither an intimate association nor an association whose expressive activity would be burdened by application of the anti-discrimination law. Rotary International and its member clubs fall squarely within the holding in the Jaycees case.

1. Jaycees identified two types of protected associational rights. The first, called by this Court the right of intimate association, turns on the right of a person to chose those with whom he

or she will enter into close personal relationships. The second, labelled the right of expressive association, turns on the by-now well recognized right of persons to join together to further ideological aims. Application of California's anti-discrimination law to the Rotary Club would violate neither right.

2. The state cannot constitutionally interfere in associations that reflect a high level of intimacy, or that parallel the smallness, closeness and exclusivity found in family relationships. Rotary shares none of these attributes. Rotary International is a huge world-wide organization. Even a local club must have at least 20 members that must reflect 20 separate business classifications, and must

actively solicit new memberships. Members of one local club can and do attend meetings at other clubs, and outsiders, including women, are invited to attend club meetings. Rotary meetings therefore are often attended by an anonymous group of people sharing none of the intimate and private characteristics of the family.

3. The state also cannot constitutionally interfere with associations whose membership policies are intended to further the expression of ideological positions. Those policies, therefore, are closely tied to the exercise of First Amendment free speech rights; and cannot be altered without impacting on the organization's ideology. Thus, an organization concerned with the interests of Jews is, as a matter of constitutional law, entitled to limit membership to Jews, and an organization interested in the rights of fathers could

limit membership to men. Rotary, however, does not generally engage in constitutionally protected expressive activities, and is even barred by its own charter from taking institutional positions on matters of public concern. Admitting women members could not, therefore, impact on the ideological stance of Rotary. Nor would admitting women as members alter the "service" objectives of Rotary were those objectives considered expressive in nature.

4. Even if Rotary had a marginal claim to a right of expressive association, the state would have a compelling interest in requiring Rotary to admit women sufficient in this case to outweigh that interest. Significant commercial and business advantages flow from membership in a Rotary club, and California, like Minnesota in the Jaycees case, has an overriding interest in

eradicating sex discrimination in the business and commercial sphere.

5. The mere fact that Rotary has some selectivity in membership does not automatically make it constitutionally immune from all state regulation. Selectivity in membership may reflect a closeness or intimacy, or, even in large associations, may promote a common expressive goal. The selectivity exercised by Rotary -- its business classification principle -- promotes neither intimacy nor furthers an organizational ideological purpose. It simply enhances the business and commercial benefit to be gained from joining Rotary. And there is nothing inherent in the business classification principle that requires the exclusion of women.

I. THIS CASE IS CONTROLLED BY ROBERTS v. UNITED STATES JAYCEES

In Roberts v. United States Jaycees[1] this Court held that application of the Minnesota Human Rights Act to compel a large non-selective association of male-only service clubs, engaged in a variety of civic, charitable and educational activities, to admit women as members did not abridge the associational rights of that male-only organization and its members.

In reaching this conclusion, the Court found various characteristics and attributes of the Jaycees to be decisive. The organization's large size, relative unselectivity in membership, and

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[1] 468 U.S. 609 (1984)

the participation of non-members, including women, in its activities, disqualified it from constitutional protection as an "intimate association." Roberts v. United States Jaycees, supra, 468 U.S.at 621. Further, Jaycees offered its members substantial commercial benefits: "[l]eadership skills..., business contacts and employment promotions". These commercial benefits made the Jaycees an appropriate subject of state regulation to insure equality of business opportunities for women and justified any impact which such regulation might have on Jaycees' right of expressive association. Id at 626-628.

These same characteristics and attributes characterize Rotary International and its local clubs

(hereafter Rotary) and dictate a similar result in this case.

A. Neither Rotary International nor any of its Member Clubs is an Intimate Association.

"The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation of certain kinds of highly personal relationships, a substantial measure of sanctuary from unjustified interference by the State." Roberts v. U.S. Jaycee, supra 468 U.S. at 618. The boundaries of that protected area are dictated by the nature of the relationships and values sought to be insulated from state intrusion.

Family ties, "those [relationships] that attend the creation and sustenance of a family -- marriage, childbirth, the raising and education of children and

cohabitation with one's relatives" 468 U.S. at 619, have been the principal beneficiaries of this constitutional shelter.[2] These relationships have been shielded from interference because they "involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctively personal aspects of one's life." Roberts v. Jaycees, supra 468 U.S. at 620.

Although the outlines of the right of intimate association beyond the family

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[2] Zablocki v. Redhail, 434 U.S. 374 (1978); Carey v. Population Services Int'l, 431 U.S. 678 (1978); Smith v. Organization of Foster Families, 431 U.S. 816, 844 (1977); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (plurality opinion).

have not been precisely delineated,[3] Roberts teaches that the relationships enjoying this right are characterized by such attributes as their relative "smallness, a high degree of selectivity in decisions to begin and maintain the affiliation and seclusion from others in critical aspects of the relationship". Id at 620. And it is also clear that "choices...that are 'private' in the sense that they are not part of a commercial relationship offered generally or widely and that reflect the selectivity exercised by an individual entering into a personal relationship..." Runyon v. McCrary, 427 U.S. 160, 189

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[3] Compare Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) with United States Department of Agriculture v. Moreno; 413 U.S. 528 (1973).

(1975) (Powell, J., concurring), stand on a preferred constitutional footing.

Where intimate associations, such as private clubs, have been protected it is because the relationships sought to be shielded are akin to those in a family. They "replicate the bonds of literal fraternity; the relationship among members is close, intimate and continuing. Its members having genuinely chosen each other as social intimates, the club functions as an extension of their homes."[4]

Judged by these standards, it needs little argumentation to conclude that Rotary International and local Rotary clubs are not entitled to protection as

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[4] Cornelius v. Benevolent Protective Order of Elks, 382 F.Supp. 1182, 1203 (D.Ct. 1974).

intimate associations. Rotary International is a world-wide federation of almost 20,000 individual clubs which in 1982 had a total membership of close to one million, almost four times the size of the Jaycees, distributed in 157 countries world-wide.[5] (J.S. App. B-2). While the average Rotary Club has about 50 members (J.S.App. G-15), no Rotary Club may be formed with fewer than 20 members representing 20 separate business classifications and a membership growth potential of at least 20 additional classifications (J.S. App. G-21). Membership in some clubs reaches as high as 900 men. (J.S. App. G-15).

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[5] Unless otherwise noted, record citations are to the Appellants' Appendix to the Jurisdictional Statement noted as J.S. App. A through G and to the Joint Appendix noted as J.A. ___.

Rotary International's "open door" policy, which permits a member of a local Rotary Club in one part of the world to fulfill his attendance "obligation" by "making up" meetings at other Rotary Clubs elsewhere in the United States or, indeed, in other parts of the world, (J.S.App. B-3 J.A. 85) underscores the relative anonymity and lack of either social cohesiveness or intimacy which characterize Rotary meetings. Some Rotary Clubs play host each week to ten or twenty members from other clubs (J.S.App. G-23-24). These are men whom the local club members have never seen before and may never see again. The transient, semi-anonymous relationships engendered by the brief luncheon or dinner meetings held at public restaurants (J.A. 39) and

advertised by road signs on the public highways (J.A.44) do not implicate any of the values attendant upon continuous close and private personal associations.

Rotary encourages attendance at meetings of guests, both membership prospects and individuals ineligible for membership, (J.A. 25, 39, 66) in order to increase membership and to publicize Rotary activities, Id. Rotary clubs also hold joint meetings with other service clubs (J.A. 39, 42).

Full representation of the local press in club membership is encouraged (J.A. 37) as well as cooperation and participation by women relatives of Rotarians in the organization's community service and other activities. J.A. 44-45). And Rotary's clubs are urged to

initiate extensive public relations efforts (J.A. 70-74) - to achieve public knowledge and understanding of Rotary's activities and to attract responsible business leaders to become members.

These activities denote not an "intimate association" secluded from others in critical aspects of their activities, but a large impersonal assemblage in which "much of the activity central to the formation and maintenance of the association involves the participation of strangers to the relationship." Roberts v. U.S. Jaycees, supra, 468 U.S. at 621.

Rotary International's encouragement of interchange of attendance at any Rotary chapter - and the impact of that policy on the asserted social cohesiveness of individual rotary clubs -

dooms Rotary's attempt to have this Court focus on the individual club rather than the entire Rotary organization. First, if this Court does so here, it is acting contrary to the wishes of the appellee local club which rejects Rotary's men-only policy. Second, and contrary to Rotary's contention, the local club is not a self-contained entity. Apart from the attendance of members from other clubs, over which the local club has no control -- it being required to play host to all transient Rotary members who seek admittance -- the over-all detailed policies and rules of Rotary are determined (J.A. passim; J.S. App. C-28, G-12) and enforced by Rotary International, and the selectivity which forbids membership to <u>women</u> is not

determined by any club, but by Rotary International.

Moreover, even were the intimacy of association to be measured by the local club alone, the result would not be different. Although the claim is made that "local Rotary clubs are selective in the admission of members," [in the sense that they pick and choose among eligible candidates for admission] and "that they operate in accordance with formal membership procedures; and admission is by vote of the members" (Appellants brief p.25), the record is totally barren of evidence that Rotary Club of Duarte or indeed any local Rotary Club has ever rejected or failed to vote in any candidate for membership on the basis of his personal qualifications or on any other basis.

This is not at all surprising in view of Rotary's commitment to and support of activities designed to extend Rotary "throughout the world," J.A.49-50, (J.S.App. (G-22), and its concomitant emphasis on maintaining and enlarging local club membership. (J.A.61-67). In fact, it was to shore up its dwindling membership that appellees sought to recruit women (J.S.App. C-7). This emphasis on growth is wholly at odds with any notion of true membership choice and selectivity as well as with the concept of an intimate association.

Although they do not call their prospective members "customers" or characterize their membership as a product to be sold, Rotary clubs do engage in continuous, aggressive recruitment of new members. For each new

member, Rotary International receives per capita dues of $17.00 and each Rotarian must become a paid subscriber to the official magazine published by Rotary International (J.A.56-57). Rotary clubs are admonished "not to establish arbitrary limits on the number of members in the clubs or fail to increase membership" (J.A. 62-63). The Rotary International Manual of Procedure sets forth an elaborate plan for ensuring membership growth: club membership is divided into groups of 5 members with each group responsible for securing one new member in the first six months of the Rotary year (J.A. 63).

Finally, a club of nearly 50 members consisting by conscious mandate of a cross-section of the business and professional community, (J.A. 36-37) see

p.27, infra, lacks almost by definition that intimacy and privacy akin to an extended family that Roberts v. U.S. Jaycees, supra, and its predecessors require before racial, religious or gender discrimination can, on that ground, be shielded by the Constitution from state regulation. Selectivity which must operate within such rigid occupational restraints clearly does not engender the emotional enrichment or self-identification which makes intimate associations worthy of such protection.

B. No Right of Expressive Association Is Infringed By Applying California's Anti-Distrimination Statute to Rotary

Just as this Court has recognized a right of intimate association "as an intrinsic element of personal liberty" Roberts v. U.S. Jaycees, supra, 468 U.S.

at 618, so too has it protected a right of expressive association: the right to join with one's fellows to pursue and by collective action amplify and make more effective the exercise of First Amendment freedoms. Roberts v. U.S. Jaycees, supra, 468 U.S. at 622 and cases cited. See also Tashjian v. Republican Party of Connecticut, 107 S. Ct. 544 (1986); NAACP v. Alabama ex rel Patterson, 357 U.S. 449 (1958); NAACP v. Button, 371 U.S. 415 (1963); Cousins v. Wigoda, 419 U.S. 477 (1975). See brief of American Jewish Congress in Corporation of Presiding Bishop v. Amos, Nos. 86-179, 86-401 at 27-30.

1. Rotary's Expressive Activities Are Limited.

In Roberts v. U.S. Jaycees, supra, a not insubstantial part of the Jaycees activities constitute[d] protected expression on political, economic, cultural and social affairs." "[O]ver the years, the national and local levels of the organization ha[d] taken public positions on a number of diverse issues" and "members of the Jaycees engaged in a variety of civic, charitable, lobbying and fundraising activities" worthy of constitutional protection. Roberts v. U.S. Jaycees at 627. However, there was no showing in the record that admitting women would change the "Jaycees philosophical cast" or "the message communicated by the group's speech". Id at 627.

Moreover, weighing these activities against the state's legitimate interests in eradicating the "unique evils" inherent in invidious sex discrimination, this Court held the "incidental abridgement" of Jaycees' protected rights to fall within the permissive ambit of state regulation.

Rotary's case for expressive association is far weaker than that of the Jaycees. In contrast to the situation presented in Roberts v. U.S. Jaycees, Rotary International and local Rotary Clubs, although they may discuss public concerns, are barred by their constitution and by-laws from taking positions on controversial public measures affecting the general welfare of the community, from endorsing political candidates, or even from circulating

resolutions, or taking any other institutional action on world affairs and international problems of a political nature. (J.A. 58-59). Thus, Rotary International and its local clubs engage in considerably less constitutionally protected expressive activity than did the Jaycees.

Nevertheless, since Rotary International does publish an official magazine as well as numerous books, manuals, pamphlets and audio visual materials and since Rotary members and clubs do engage in "civic, charitable and fund raising activities," expressive freedom is implicated to some extent in this case, although as noted, to a far lesser degree than in Roberts v. U.S. Jaycees, supra, 468 U.S. at 627.

2. Intrusion on Rotary's Speech is Minimal

Here too, as in Roberts v. U.S. Jaycees, no showing was made that application of the Unruh Act to Rotary International would impose any serious burdens on the male members' freedom of expressive association. There was no showing, for example, that Rotary engages in any civic or charitable service or activity that women could not perform as well, or that women would find less congenial, or that is in any way gender connected. Roberts v. U.S. Jaycees, supra, 468 U.S. at 627. See Hishon v. King & Spalding 467 U.S. 69, 81 (1984) (Powell, J. concurring).

Unlike the Jaycees, Rotary International's service objectives are

not limited to "promot[ing] the views of young men." 468 U.S. at 627. Rather its commendable goals of "encouraging and fostering the ideal of service... achievement of high ethical standards in business and professions.....as well as the advancement of international understanding, good will and peace through a world fellowship of business men united in the idea of service" (J.A. 35) are all universal in nature. None of them are gender specific; all of them can be achieved by both sexes working together.

Rotary urges as one of its arguments that "as a male only organization Rotary has been able to operate effectively over a world-wide base of varied cultures and social mores" (Appellants brief, p. 10). The deposition testimony of Rotary

International's General Secretary is far too general and nebulous to support any such conclusion as a material factor in invalidating state anti-discrimination legislation. In a world that has seen Margaret Thatcher, Indira Gandhi, Gro Harlem Brundtand, Corazon Aquino, Golda Meir, Simone Vail Sirimavo Bandaraike and Benazir Bhutto among many others, "operate effectively" on the international scene, Mr. Pigman's testimony represents a perception as outmoded and antediluvian as Rotary's own policy.[6] Nothing better illustrates this than the pathetic effort of General Secretary Pigman to describe the

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[6] In any event, the Unruh Act does not outlaw sex discrimination in that dwindling number of countries where the social mores do not allow the mixing of men and women, or where the laws permit such discrimination.

allegedly adverse effects of admitting women on Rotary activities. (J.S. App. G-53). His attempted explanation reduces itself to the oft-discredited belief that male members will lose their "ease of communication" and suffer a deprivation of some undefined "chemistry" attributable to an all- male organization. Any such "loss" is far too attenuated to merit constitutional protection.

Rotary does not claim that admission of women members would affect the content of Rotary's expression by shifting Rotarian "service" into activities with a greater impact on women. The reason is plain; the record not only fails to

support any such argument[7] it demonstrates the contrary. None of the service activities in which the Duarte club engaged prior to its admission of women was particularly male oriented; and there is no evidence that after their admission the women sought to change the nature or emphasis of these programs.[8]

3. The State's Interest Is Compelling

Even if the Unruh Act effects some minimal intrusion on the Rotary's right

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[7] Under these circumstances, any such claim by Rotary would have to rely on the "unsupported generalizations about the relative interests and perspectives of men and women" which this Court rejected in Roberts v. U.S. Jaycees, supra, 468 U.S. at 628.

[8] All of the activities set forth in the Duarte Rotary club plans and objectives for the years 1970-1973 as reported to Rotary International involved activities equally valuable to women and from whose benefits women were in no way disqualified. They included providing assistance and occupational information for students at Duarte High School, providing volunteer workers for community recreation programs, providing a student

of expressive association, it is clear that, as in Roberts, the state's compelling interests justify that intrusion and the intrusion is limited to that necessary to achieve these interests.

The Unruh Civil Rights Act (Cal. Civ. Code §51), like the Minnesota Human Rights Act at issue in Roberts, does not have as its purpose the suppression of speech, nor does it distinguish between prohibited and permitted activity on the basis of viewpoint. (C-37). See

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safety program assembly, making available three professional people to assist and take part in the high school's career night program; attempting to start "a service club for young men and women of secondary school age"; organizing an overnight outing for underprivileged children at a mountain camp site and providing a scholarship for deserving Duarte High School students. (J.S. App G-28-30). These activities are typical of the range of activities engaged in by all Rotary clubs (J.S. App. G-32).

Broadrick v. Oklahoma, 413 U.S. 601, 616 (1973); Grayned v. City of Rockford, 408 U.S. 104 (1972). Neither is there any evidence that the Unruh Act was enforced against Rotary "for the purpose of hampering the organization's ability to express its views," Roberts v. Jaycees, supra, 468 U.S. 623-624.

As was also the case with the Minnesota statute in Roberts v. U.S. Jaycees, supra, the California Court of Appeal found that the Unruh Act serves a compelling state purpose of the highest order; in fact, the identical interest specified in Roberts v. U.S. Jaycees: "the eradication of discrimination on the basis of sex by 'business establishments' in the furnishing of 'accommodations, advantages, facilities, privileges or services.'" (J.S. App. C-37, C-10).

In this case, as in Roberts V. U.S. Jaycees, the state court found that commercial advantages and business benefits flowed from membership in Rotary. (J.S. App. C-22-23). Indeed, because of the membership "classification principle" utilized by Rotary, the commercial advantages and benefits in joining Rotary are far more substantial than those to be had from joining Jaycees. Rotary membership is limited to a cross section of business and professional men - only one or two from each business or professional classification.

The individual Rotarian not only gains business access to this diverse group of businessmen, each of whom is an acknowledged "leader" in his field, but he obtains the community recognition and

prestige which results from Rotary's selection of him as such a "leader". Clubs are urged to maximize the business benefits derived from membership by setting up "committees to be comprised of several members, each representing a different major classification for the purpose of giving confidential business advice and assistance to Rotarians who may request such help" and to hold "clinics" and "forums" to discuss economic problems (J.A. 40).

Rotary thus institutionalizes the "old boy" network and makes available to its members not only preferred access to business leaders in the community but advice and guidance from these successful business men for which "consultations" non-Rotarians would have to pay handsomely.

Membership also entitles the Rotarian to attend more formally organized "business relations conferences" where he learns management and labor relations techniques, business expertise for small businessmen and other subjects that help him improve his business and professional skills, often from non-Rotarian experts (J.A. 14, 15, 28, 29). A subscription to the Rotarian, a publication replete with tax and other business advice for executives and professionals, is also mandatory for all Rotarians (J.A. 57).

Both Rotary members and the Internal Revenue Service recognize the significant commercial benefits to be derived from club membership. Rotarians deduct club dues from their income tax as business expenses, and the Internal Revenue

Service allows such deductions. (J.S. App. C-25). Further, the club dues of some Rotary members are paid by their employers directly and deducted as business expenses of the firms. (J.S. App. C-25-26).[9]

C. "Selectivity" In Membership Alone Does Not Dictate Immunity From Regulation

Rotary tries to blunt the force of

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[9] In order to deduct such dues, taxpayers must claim that they are "ordinary and necessary" in carrying on of one's trade or business, I.R.C.§162. Dues or fees paid for membership in such organizations as Kiwanis, Lions Club, Rotary, as well as professional associations such as bar associations and medical associations, are distinguished for purposes of deductibility from dues paid to social, athletic or sporting clubs. The latter are treated as an expenditure for an entertainment facility for which a deduction is permitted [for dues] only if the taxpayer uses the club more than 50 percent for business purposes, whereas no such 50 percent rule is imposed on use of facilities of service clubs or professional associations. See I.R.C. §274; Sen. Rep.

obvious similarities between itself and the Jaycees by seizing upon the reference to the Kiwanis organization in this Court's Roberts v. U.S. Jaycees decision. Roberts v. United States Jaycees, supra, 468 U.S.at 630. Specifically, Rotary urges that the mention of Kiwanis as having "a formal procedure for choosing members on the basis of specific and selective criteria," 468 U.S at 630, was intended to suggest that this type of membership "selectivity" entitles an organization to immunity from state regulation of its discriminatory membership policies.

Rotary's reliance on the Kiwanis reference is misplaced for it was not

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No.1881, 87th Cong. 2d Sess. 33 (1962); Rev. Rul. 63-144-1963-2 C.B. 129, Q & A 56.

material to this Court's analysis of either intimate or expressive associational freedom. In responding to Jaycees "void for vagueness" argument, this Court noted the Minnesota Supreme Court's Kiwanis dictum as bearing on its construction of the Minnesota Human Rights Act. Yet even the Minnesota Supreme Court did not hold that Kiwanis' greater selectivity placed it outside that Act. It merely rejected the factual suggestion that the Jaycees was as selective as Kiwanis. And this Court said no more than that the reference to Kiwanis gave the Human Rights Act more rather than less specificity. 468 U.S. at 630.

The mere fact of selectivity, without analysis of what the selective membership criteria are and how they bear both on

the purposes of the state statute and First Amendment associational protections does not exclude an organization from the reach of the Unruh Act.[10]

A similar analysis is required before expressive associational First Amendment protections may successfully be invoked. Obviously, selectivity or exclusivity in membership will in some instances be integral to an organization's right to associational freedom. Selectivity in membership, when coupled with such factors as small size, secluded and private operation and membership control can indicate the existence of an intimate

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[10] Cf. Kiwanis International v. Ridgewood Kiwanis, ___ F.2d ___ (3rd Cir. 1986) (Club of 28 members which did not unselectively invite public membership held not a "place of public accommodation" under New Jersey public accommodation law).

association. As we have shown, supra, Rotary, which conducts its manifold activities in full public view, which boasts a huge membership, substantial budget, extensive staff and control apparatus, a membership attendance policy that encourages attendance at clubs other than the member's home club, and a "classification" principle that by requiring representation in the club by at least one leader of every classification of business and profession operating in the community limits membership choice, does not fit under the intimate assocation rubric.

However, even in large "public" organizations which aggressively seek members and whose members may derive some incidental business advantage from associations made there, membership

selectivity in the sense that particular groups are excluded from membership, may nevertheless entitle an organization to constitutional protection as an expressive association, when the selectivity substantially furthers activities which preserve and advance bona fide ideological, religious, cultural or ethnic values and practices.

In the case of such organizations, there is a clear nexus between the membership restrictions and First Amendment concerns. Government efforts to enlarge or change membership requirements in those situations would significantly intrude upon the association's protected expression. That particular expression is shaped by, and is often the product of membership selectivity, which, in turn, is dictated

by the organization's valid ideological and philosophic purposes.

As an example, we cite that association with which we are most familiar, the American Jewish Congress. The AJCongress is an organization largely devoted to taking advocacy positions on public issues. Our membership is limited to persons of the Jewish faith, who subscribe to its purposes and agree to abide by its Constitution. Those purposes include "a commitment to the unity and creative survival of the Jewish people throughout the world."

The positions American Jewish Congress expresses in legislative testimony, court briefs and convention resolutions are related to and formed by a distinctive heritage and screened

through a unique religious and cultural prism. [11]

For example, centuries of persecution and in more recent years, discrimination, during which Jews were subject to quotas limiting their access to professional, business and academic facilities have given them a unique sensitivity and perspective on the issue of academic and employment quotas and resulted in their filing a significant number of briefs in this Court on the subject. As a minority religion and the victim of pogroms and inquisitions, Jews also have had a very special view on the issues of free exercise of religion and separation of church and state. Here, too, the American Jewish Congress has

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[11] See Justice Frankfurter dissenting in West Virginia State Board of Education v. Barnette, 319 U.S. 624, 646 (1943).

expressed a distinctive point of view to this and other Courts. For a state to force an organization such as this to admit non-Jews who do not share this very special history would clearly work very real limitations on its First Amendment freedoms. [12]

Rotary International is simply not such an organization. Whatever

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[12] Other organizations in which membership "selectivity" is relevant to the exercise of First Amendment freedoms and which should for that reason be shielded from state regulation of membership policies designed to assure equality of access to quasi-public facilities include organizations of Blacks and women seeking to advance the special concerns of these historically disadvantaged groups, nationality groups seeking to preserve bona fide historical and ethnic traditions and values and even all male groups whose goals and purposes address uniquely male needs and concerns. Among the latter groups would be groups of fathers seeking reform of child custody laws, or husbands of laws on alimony, or of males associating to

membership selectivity it exercises, be it the restriction to men or to business and professional leaders, has had no valid relationship to, or impact upon, the organization's very limited forays into protected speech. See p.18, supra. In fact, that very selectivity, in the

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oppose affirmative action for women. The amicus brief filed by the Boy Scouts of America argues issues that are simply not raised by this case. As noted in that brief, (p.5), the Boy Scouts case now pending in the lower California courts presents, as the main question, whether the state can require admission of persons who espouse beliefs or goals contrary to those officially adopted by the organization, in that case the moral belief opposing homosexuality. That issue does not arise here, and a decision in favor of Appellees here will not foreclose Boy Scouts from pursuing their contentions in their own case. It is unnecessary to further note that under this Court's decision in Bowers v. Hardwick, 106 S.Ct. 2841 (1986), homosexuality is not on a par with race, religion or gender, either in terms of constitutional protection or susceptibility to state regulatory power.

form of the classification principle, both in origin and present effect, merely emphasizes the commercial and business benefits derived from the organization. It is the denial of these important benefits to women [13] with all the disadvantages and stigma that such denial entails, which, weighed in the light of the minimal impact on Rotary's protected speech, makes Rotary a fit subject for state regulation despite, or even because of, its alleged "selectivity". Railway

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[13] We need not repeat here the extensive evidence submitted to and relied on by the Court in Roberts v. U.S. Jaycees, supra, with respect to the "importance of removing the barriers to economic advancement and political and social integration that have historically plagued...women. 468 U.S. at 626." Nor is it necessary at this late date to dwell on the "serious social and personal harms" laws prohibiting gender discrimination in "various forms of public, quasi-commercial conduct" were designed to eliminate. Id at 625.

Mail Association v. Corsi, 326 U.S. 88, 94 (1945); See also Garcia v. Texas State Board of Medical Examiners, 421 U.S. 995 (1975), aff'g mem., 489 F.Supp. 434 (W.D. Tex. 1974) (state prohibition on practice of medicine by association of laymen); Waugh v. Mississippi University, 237 U.S. 589 (1915) (state interest in assuring appropriate educational atmosphere at public university justifies limitation on student membership in fraternities).

The California Court of Appeals noted that commercial and business advantage was the original impetus for creation of Rotary:

> "The earliest meetings of the Rotarians...were designed to produce business for each member (Rotary Basic Library, Focus on Rotary, Vol. 1, p.2). The men who joined were "motivated primarily by the business they expected to

> receive from other club members...(Rotary Basic Library, Vocational Service, Vol. 3, pp.6-7...).
>
> The trial court found that the classification principle of selecting one representative from each business and profession "originated many years ago from self-seeking commercial purposes." (J.S.App. C-23-24).

Membership is still based on the classification system and those commercial purposes and benefits still obtain. Despite present disclaimers "that the Rotary has for many years abandoned the use of the classification system as a device to encourage preferential business relations among Rotarians" (J.S. App.B.4), the written Rotary policy on "Commercializing Rotarians" expresses a candid recognition

that these commercial advantages and benefits remain to this day.[14]

Moreover, as we have shown, supra p.29, this very classification principle, the "selectivity" which Rotary claims distinguishes it from Jaycees, contributes to the commercial benefit enjoyed by Rotary members, because it involves not only contact with a diverse group of business and professional leaders but public recognition of the Rotary member as a "leader" in his own field.

This kind of commercial benefit clearly does not accrue from the more indiscriminate membership policies of organizations like Jaycees. It is a form

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[14] "If new or increased business comes naturally to a Rotarian as a result of friendships which he has made in Rotary, that is a normal development which takes place outside Rotary as well as inside, and is not in any way an infringement of the ethics of Rotary membership." Exhibit A. 1971 Manual of Procedure page 38 (J.S. App. G-36).

of selectivity, however, that is essentially gender neutral. Nothing in the classification requirement militates against the admission of women. Women today are represented in all the diverse classifications of businesses and professions. See U.S. Department of Labor, Bureau of Labor Statistics, Employment and Earnings p.29 (Nov. 1986). Many are recognized leaders in these fields in communities across the country. Indeed, the Duarte chapter opened its membership to women for precisely that reason. And women have an illustrious history of service to their communities.

Conversely, application of the Unruh Act to Rotary International and its local clubs would not, as a matter of constitutional law, require admission of any woman who is not a business or

professional leader in an "open" classification or who does not meet the club's standards of character, business, social standing and general eligibility. Cf. Democratic Party v. Wisconsin 450 U.S. 1071 at 122, (1981); Cousins v. Wigoda, 419 U.S. 477 (1975); L. Tribe American Constitutional Law, 791 (1978).

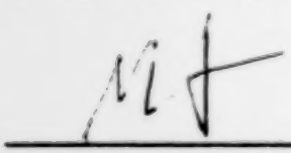
The Unruh Act as applied in this case requires only the elimination of "arbitrary" forms of discrimination, not that type of selectivity which is consistent with, and designed to further, bona fide organizational purposes. It requires only that Rotary cease denying membership to women. For the same reasons that prompted this Court's decision in Roberts v. U.S. Jaycees, supra, the very limited impact on Rotary's expressive association is

heavily outweighed by the state's interest in ending an invidious discrimination which does not further any of Rotary's legitimate objectives.

CONCLUSION

Accordingly, the judgment of the California Court of Appeals should be affirmed.

Respectfully submitted,



Marc D. Stern
Counsel of Record
Lois C. Waldman
Amy Adelson
American Jewish Congress
15 East 84th Street
New York, N.Y. 10028-0407
(212) 879-4500

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